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No. 90-1665

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KIDDER, PEABODY & CO. INCORPORATED,
Petitioner,

v.

MAXUS ENERGY CORPORATION and
MAXUS CORPORATE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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27 p.

QUESTION PRESENTED

Whether the district court, having disposed of all federal law claims prior to trial, abused its discretion by retaining pendent jurisdiction over certain important state law issues referable to damages that were then being litigated, along with all other state law issues, in a pending state court proceeding that had been previously filed.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Martin A. Siegel and Ivan F. Boesky were defendants in the district court, and Ivan F. Boesky was an appellee in the court of appeals. Pursuant to Supreme Court Rule 29.1, the following list identifies all parent companies, subsidiaries (other than wholly-owned subsidiaries), and affiliates of respondents Maxus Energy Corporation and Maxus Corporate Company:

1. Maxus Energy Corporation, a Delaware corporation.

2. Diamond Shamrock Offshore Partners Limited Partnership, a Delaware limited partnership.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

A. The Natomas Acquisition

In January 1983, Diamond Shamrock Corporation ("Diamond Shamrock") retained Kidder, Peabody & Co. Incorporated ("Kidder") to render advice concerning possible mergers or acquisitions. Pet. App. 3a. Kidder's team of investment advisers was led by Martin A. Siegel ("Siegel"), who was then one of Kidder's vice presidents and directors. Pet. App. 3a. Acting on Kidder's advice and under a confidentiality agreement, Diamond Shamrock began a tender offer for Natomas Company ("Natomas") in May 1983 and later acquired Natomas in a negotiated transaction, under which both Diamond Shamrock and Natomas became wholly-owned subsidi-

aries of a newly created parent, Maxus Energy Corporation.[1] Pet. App. 3a. When the transaction was completed in August 1983, Diamond Shamrock's former shareholders owned 54% of Maxus' stock, and Natomas' former shareholders owned the remaining 46%. Pet. App. 3a.

B. The Texas State Court Action

On February 13, 1987, the Securities and Exchange Commission ("SEC") filed a complaint against Siegel alleging that, during the Diamond Shamrock/Natomas transaction, he had illegally disclosed material non-public information to Ivan F. Boesky ("Boesky"). Pet. App. 4a. The SEC further alleged that Boesky had used this inside information to purchase Natomas stock, thereby reaping at least $4.8 million in insider profits. Pet. App. 4a.

After learning of the SEC's complaint, Maxus commenced negotiations with Kidder in an attempt to resolve the potential legal claims arising from Siegel's illegal activities. Pet. App. 4a. Those negotiations proved fruitless, however, and on November 23, 1987, Maxus filed suit in Texas state court against Kidder, Siegel, and Boesky. Pet. App. 4a. This suit included no federal law claims; rather, Maxus asserted state law claims against Kidder for breach of contract and negligence, and against all three defendants for breach of fiduciary duty, fraud, conversion, and violations of § 27.01 of the Texas Business and Commerce Code. Pet. App. 4a. As actual and consequential damages, Maxus sought, among other things: (1) the more than $4 million paid to Kidder in connection with the Natomas acquisition; (2) the more than $56 million in out-of-pocket costs incurred in the Natomas acquisition; (3) the losses it incurred from

[1] Unless the context requires otherwise, Maxus Energy Corporation and Maxus Corporate Company are referred to collectively as "Maxus."

being fraudulently induced to acquire Natomas; (4) the inflated amount it paid to acquire Natomas due to the defendants' illegal conduct; and (5) punitive damages. Pet. App. 4a-5a.

C. The Federal Court Action

Later that same day, Kidder filed this action in the District Court for the Southern District of New York. Pet. App. 5a. Kidder sought a declaratory judgment that it was not liable to Maxus under § 10(b) or § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(e) (1988). Pet. App. 5a. Kidder also sought to invoke the district court's pendent jurisdiction and obtain a declaration that it had no liability to Maxus on various state law theories, including breach of contract, breach of fiduciary duty, fraud, and negligence. Pet. App. 5a-6a.

In response to Kidder's suit, Maxus repeatedly represented—in the sworn affidavits of its general counsel, in its motion papers, and in oral statements by its counsel on the record in the district court—that it would never assert a § 10(b) or § 14(e) claim against Kidder. Pet. App. 20a & n.1. Indeed, shortly after Kidder filed suit, Maxus moved to dismiss the action, arguing that it represented an inappropriate use of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1988). Pet. App. 5a-6a. The district court denied the motion to dismiss without prejudice to its renewal at the completion of pre-trial proceedings. Pet. App. 6a. Thus, after Boesky, joined by Kidder, moved for judgment on the pleadings, Maxus renewed its motion to dismiss the § 10(b) and § 14(e) claims as moot. Pet. App. 6a.

D. The Delaware Action

On the same day Kidder filed this action, it also brought a similar case in Delaware state court. Pet. App. 5a. In this Delaware case, Kidder sought a declara-

tion that it was not liable for damages on the same state law causes of action identified in the federal action as pendent claims. Pet. App. 5a. On cross motions for summary judgment, the parties asked the court to decide whether Maxus had suffered corporate injury, and if so, whether Maxus was barred from recovering for that injury under the equitable rule discussed in *Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R.*, 417 U.S. 703 (1974). The Delaware court refused to reach these issues, however, noting that the liability issue would be resolved elsewhere. Thus, the Delaware court concluded that what the parties sought was "in effect a partial summary judgment on certain aspects of a single claim, and that while such a determination should be available . . . in a court that will litigate the validity of the claim, it would be unprecedented for a court that will not try the validity of a claim to, in effect, engage in pretrial pruning of a claim to be litigated elsewhere." *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 1988 WL 140228, *1 (Del. Ch. Dec. 27, 1988).

E. The District Court's Declaratory Judgment

The district court thereafter denied Maxus' motion to dismiss the action as moot, choosing instead to confirm Maxus' representations with a declaratory judgment dated April 12, 1990. Pet. App. 25a-27a. Thus, in the fourth paragraph of its judgment, the district court declared:

> Maxus Energy Corporation and Maxus Corporate Company have expressly represented and conceded in open court that neither has or may assert at any time hereafter, directly or indirectly, against Kidder, Peabody & Co. any claims under Section 10(b) or 14(e) . . . with respect to the Combination of Natomas Company and Diamond Shamrock, or the incidents thereof, including claims that they or any of their stockholders did not receive, under the distribution formula, a just distribution of the equity

> stock of the new holding company, in which Diamond Shamrock and Natomas Company were combined and became subsidiaries, because of alleged prior misconduct of Martin A. Siegel and prior alleged insider trading by Ivan F. Boesky with respect to Natomas Company or its stock.

Pet. App. 26a. The district court then stated, however, in paragraph five of its judgment, that "[t]he exchange ratios of the negotiated, stock for stock, distribution of the equity stock of the new holding company [*i.e.*, Maxus] to the stockholders of Natomas Company and . . . Diamond Shamrock Corporation are not subject to retroactive adjustment on claims by Diamond Shamrock," and "may not be challenged" by Maxus, which "suffered no cognizable injury therefrom." Pet. App. 26a-27a. Finally, in paragraph seven of its judgment, the district court concluded that "[t]he balance of [Kidder's] claims to declaratory relief, essentially based on its fee controversy with Diamond Shamrock, are pendent state claims over which this Court declines to exercise jurisdiction." Pet. App. 27a.

F. Post-Judgment Events

On May 8, 1990, Kidder moved for partial summary judgment in the Texas action, arguing that the district court's declaratory judgment eliminated most of Maxus' claims. Pet. App. 7a. Maxus disputed this reading of the district court's decision, pointing out that the declaratory judgment focused on Kidder's request for a declaration of non-liability under § 10(b) and § 14(e). After a hearing, the Texas court denied Kidder's motion on June 20, 1990. Pet. App. 7a. Kidder responded to the Texas court's ruling by seeking an injunction from the district court barring further litigation in Texas. Pet. App. 7a. Despite the fact that an appeal of its earlier judgment was then pending in the court of appeals, the district court enjoined Maxus from pursuing in the Texas action any claim "arising from the merger exchange formula,

as well as what led up to it . . . whether such claims . . . are denominated as federal or state." Pet. App. 88a.

G. The Court of Appeals' Decision

Maxus' appeals from the declaratory judgment and the injunction were consolidated. On February 6, 1991, a unanimous panel affirmed in part, reversed in part, and remanded. Pet. App. 1a-18a.

The panel first affirmed the district court's decision to proceed with a declaratory judgment on the federal law claims despite Maxus' disavowal of those claims. In the court of appeals' view, it was appropriate for "the district court [to] declare[] the rights of the parties in accordance with the very representations [Maxus] made" —namely, that neither Maxus Energy Corporation nor Maxus Corporate Company would ever assert a claim against Kidder under § 10(b) or § 14(e). Pet. App. 12a-13a.

The panel next construed the district court's decision as selectively reaching certain state law issues and concluded that it was error for the district court to do so. The court reasoned that, because the district court already had declared that Maxus could not pursue a claim under § 10(b) or § 14(e), it was "unnecessary to declare that [Maxus] could not seek damages on any claim it might assert in the Texas action under Texas law." Pet. App. 13a.

Specifically, after reviewing the factors identified in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)—"the values of judicial economy, convenience, fairness, and comity"—the court found that "[t]he strong interests of federalism and comity in this case pointed toward divestiture of pendent jurisdiction." Pet. App. 14a. The court noted that Maxus had chosen "to have the damages issues determined in the Texas court"; that "the Texas court proceedings were moving along and

were almost at the discovery stage"; that the "issue of damages . . . which the district court found to be governed by the *Bangor Punta* rule . . . was directly before the Texas court," which "could capably and competently decide" the question; and that "the state law issue of damages arising from the transaction was not so inextricably intertwined" with federal policies to require the exercise of pendent jurisdiction. Pet. App. 14a-15a.

Thus, the court concluded that "[a]lthough it was proper for the court under the circumstances to settle the federal securities claims once and for all, it was error to dispose of the state law issues relating to [Maxus'] damages arising from the alleged tipping by Siegel, the subsequent elevation of the price in Natomas stock, and the inflated exchange ratio occasioned by the allegedly unlawful activities." Pet. App. 15a (citing *Carnegie-Mellon*, 484 U.S. at 350).

H. Kidder's Stay Application

After the court of appeals rendered its decision, Kidder sought rehearing, which was denied on March 14, 1991. Pet. App. 35a-36a. Kidder then moved in the court of appeals for a stay of the mandate pursuant to Federal Rule of Appellate Procedure 41(b). On March 29, 1991, the court of appeals denied this motion as well. Kidder subsequently sought a stay of the mandate from Justice Marshall, who denied the request on April 3, 1991. Kidder then renewed the application before Justice O'Connor, who referred it to the full Court, where it was denied on April 15, 1991.

REASONS FOR DENYING THE WRIT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

I. THERE IS NO CONFLICT IN THE CIRCUITS

Kidder principally argues (Pet. 7-14) that review is necessary to clear up judicial confusion and conflict concerning the circumstances under which district courts may properly exercise their discretion to adjudicate claims of state law under the doctrine of pendent jurisdiction. In doing so, Kidder concedes that, after this Court's decisions in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), and *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the "basic legal principles governing the exercise of pendent jurisdiction are by now well-established." Pet. 8. But Kidder nevertheless contends that courts of appeals have taken varying approaches in applying these principles, with some courts placing decisive emphasis on concerns of judicial economy and others placing decisive emphasis on concerns of federalism and comity.

Kidder appears, however, to be the only one to have uncovered this alleged judicial conflict. None of the decisions cited by Kidder take note of the alleged conflict or even hint that it exists. On the contrary, as those courts themselves point out, the "varying approaches" to which Kidder refers reflect nothing more than different outcomes attributable to factual differences in the cases—differences that are to be expected given this Court's direction in *Carnegie-Mellon* that "a federal court should consider and weigh *in each case*, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction" over pendent state law claims. 484 U.S. at 350 (emphasis added).

The primary Fifth Circuit decision on which Kidder relies (Pet. 9) is *Ingram Corp. v. J. Ray McDermott &*

Co., 698 F.2d 1295 (5th Cir. 1983). Kidder cites *Ingram* to support the notion that "judicial economy, convenience, and fairness to litigants are the hallmarks of the pendent jurisdiction doctrine." Pet. 9 (internal quotation omitted). Kidder neglects to mention, however, that the *Ingram* court made this comment in the course of reaching state law claims at the urging of both parties. More important, before using the "hallmarks" language that Kidder prefers, the *Ingram* court spoke of the need to "reconcile important considerations of state and federal comity with equally weighty concerns of judicial economy, convenience, and fairness—all cornerstones of pendent jurisdiction doctrine," and emphasized the danger of "an unbending approach to pendent jurisdiction questions." 698 F.2d at 1319. Indeed, in cases Kidder does not cite, the Fifth Circuit often relies on comity and federalism concerns in ruling that pendent jurisdiction should not be exercised. *See, e.g., LaPorte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1257 (5th Cir. 1986); *Laird v. Board of Trustees*, 721 F.2d 529, 534-35 (5th Cir. 1983); *Ruiz v. Estelle*, 679 F.2d 1115, 1158-59 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). In short, contrary to Kidder's suggestion, the Fifth Circuit does not place primary emphasis on the judicial economy factor.[2]

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[2] The other Fifth Circuit cases cited by Kidder (Pet. 9 n.3) similarly fail to reflect any such emphasis. *Caserta v. Village of Dickinson*, 672 F.2d 431 (5th Cir. 1982), involved a full trial of *both* federal and state claims. The two-page opinion simply notes the *Gibbs* analysis and concludes that, since the state claims were fully litigated, the interest in judicial economy warranted exercising pendent jurisdiction. 672 F.2d at 433. In *Brown v. Knox*, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977), the court also noted the *Gibbs* factors and, after "giv[ing] due consideration to these factors," concluded that "'in view of the posture of the case before the district court'" pendent jurisdiction should be exercised. 547 F.2d at 902. Thus, like *Ingram*, both *Caserta* and *Brown* are simply fact-specific applications of pendent jurisdiction principles. Neither even hints that comity concerns are not significant; indeed, *Brown* was careful to note that the state law issues

The Seventh Circuit case that Kidder cites (Pet. 9)—*Graf v. Elgin, Joliet & E. Ry.*, 790 F.2d 1341 (7th Cir. 1986)—is equally unavailing. Kidder quotes *Graf* as identifying judicial economy as "the essential policy behind the modern doctrine of pendent jurisdiction," and reads the case as adopting a per se rule: "In the Seventh Circuit, jurisdiction will be retained '*in any case* where substantial judicial resources have already been committed . . . .'" Pet. 11 (emphasis in original). The *Graf* court itself, however, rejected any such per se approach, noting that pendent jurisdiction is "the point of balance" between judicial economy and comity (790 F.2d at 1346), that pendent jurisdiction is "a flexible procedure" (*id.* at 1347), and that, "in this and other circuits," "when the federal claims drop out before trial any pendent state law claims should be dismissed" (*id.* at 1347). Thus, as with the Fifth Circuit, the Seventh Circuit, contrary to Kidder's suggestion (Pet. 9), does not consider federalism and comity concerns inferior to concerns of judicial economy.[3]

The Ninth Circuit cases that Kidder cites (Pet. 9 n.4) also fail to reveal any such undue bias toward judicial economy concerns. For example, the court in *Meyer v. California & Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981), while concluding that the balance weighed in favor of retaining pendent jurisdiction in that

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in that case were "not particularly complex." 547 F.2d at 903. Finally, *Perry v. Jones*, 506 F.2d 778, 781 (5th Cir. 1975), is not even on point; it addresses not the decision whether to exercise pendent jurisdiction, but only the issue whether the complaint "stated a cause of action."

[3] Kidder's effort to point to the Seventh Circuit is further undercut by decisions of that court which Kidder fails to cite. In *United States v. Zima*, for example, the Seventh Circuit noted that "[t]he federal appeals courts in general . . . and this court in particular . . . have indicated a strong preference for the dismissal of pendent or ancillary claims whenever the district court disposes of the federal claim or claims prior to trial." 766 F.2d 1153, 1158 (7th Cir. 1985) (citations omitted); *accord, Blau Plumbing, Inc. v. S.O.S. Fix-it, Inc.*, 781 F.2d 604, 611 (7th Cir. 1986).

case, was careful to note that "[f]ederal courts should not reach out unnecessarily to decide state law claims." Likewise, in the other two cases that Kidder cites (Pet. 9 n.4), the Ninth Circuit did not in any way suggest that it was adopting a per se rule or that it would refuse to acknowledge that comity interests should prevail over judicial economy interests in an appropriate case.[4] Indeed, in cases that Kidder neglects to cite, the Ninth Circuit has repeatedly recognized the significance of, and based its pendent jurisdiction analysis on, federalism and comity concerns. *See, e.g., Notrica v. Board of Supervisors*, 925 F.2d 1211, 1214-15 (9th Cir. 1991); *Durham v. Kelly*, 810 F.2d 1500, 1506 (9th Cir. 1987); *Dezell v. Day Island Yacht Club*, 796 F.2d 324, 328 (9th Cir. 1986). Thus, in *Danner v. Himmelfarb*, 858 F.2d 515, 523 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989), the Ninth Circuit stated that "it is our practice to dismiss state law claims once the federal claim has been resolved."

Turning to the other side of the alleged conflict, Kidder errs in suggesting (Pet. 8) that "[t]he approach of the Second Circuit stands at one extreme," where "concerns for judicial economy, convenience and fairness to the parties . . . [are] quickly dismissed." In fact, the Second Circuit has repeatedly found that "interests of judicial economy" may warrant exercise of pendent jurisdiction even after dismissal of all federal law claims. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985) (internal quotations omitted); *accord, Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990)

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[4] In *In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1490-91 (9th Cir. 1985), the Court noted that the federal and state claims were inextricably intertwined and, accordingly, simply concluded that judicial economy, convenience, and fairness therefore called for exercising pendent jurisdiction. In *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 904 (9th Cir. 1983), the court simply noted that the district court's exercise of pendent jurisdiction was not an abuse of discretion "because the record shows that the court and the litigants had expended considerable time" on the state claims before the federal claims were dismissed.

("[D]enial of pendent jurisdiction here would be a waste of judicial resources, given the extensive proceedings involving the pendent claims prior to the dismissal of the federal claim.").[5]

Kidder likewise errs in suggesting (Pet. 10-11) that the D.C. Circuit has established an "effective presumption" that claims under state law must be decided by state courts. In *Grano v. Barry*, the only D.C. Circuit case that Kidder cites, the court simply concluded that the exercise of pendent jurisdiction was error there because "the case involves 'novel and unsettled' issues of state law." 733 F.2d 164, 169 (D.C. Cir. 1984) (quoting *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 775 (D.C. Cir. 1982)). The recognition of, and reliance on, comity interests in such a case does not indicate that the D.C. Circuit refuses to consider or base its decision on interests in judicial economy; to the contrary, that court often does so. *See, e.g., District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988) (relying on "judicial economy and convenience"); *Dimond v. District of Columbia*, 792 F.2d 179, 189 (D.C. Cir. 1986) ("Considerations of judicial economy clearly indicate that this pendent claim should be decided along with the federal claims."). Thus, as even Kidder is forced to acknowledge (Pet. 11 n.5), the

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[5] *See also, e.g., Enercomp, Inc. v. McCorhill Publishing, Inc.*, 873 F.2d 536, 545 (2d Cir. 1989) (noting that "substantial judicial resources had been invested in the case" in holding pendent jurisdiction was properly exercised); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir.) (holding that "[c]onsiderations of 'judicial economy, convenience and fairness to litigants' . . . made it proper for the district court to retain [pendent] jurisdiction over the state law claims") (quoting *Gibbs*, 383 U.S. at 726), *cert. denied*, 476 U.S. 1159 (1986); *National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 68 (2d Cir. 1985) (approving exercise of pendent jurisdiction out of "due regard to considerations of judicial economy"); *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973) ("considerations of judicial economy" warrant retention of pendent jurisdiction over state claims after federal claims dismissed).

recognition of a significant comity interest in a case such as *Grano* is merely the acceptance of this Court's direction in *Gibbs* that it is preferable to afford the parties "a surer-footed reading of applicable law." 383 U.S. at 726.

Finally, the Third Circuit cases that Kidder cites (Pet. 11 n.5, 13 n.8) similarly do not establish any such presumption in favor of state court resolution of state law claims. Kidder attempts to buttress its case for this "effective presumption" by quoting *Shaffer v. Board of School Directors'* comment that "a strong policy exists in favor of resolving state law issues in state court." 730 F.2d 910, 912 (3d Cir. 1984). Kidder neglects to mention, however, that in making this comment, the Third Circuit in *Shaffer* was merely explaining why comity concerns form a critical part of the *Gibbs* analysis. Likewise, the decisions in *Weaver v. Marine Bank*, 683 F.2d 744 (3d Cir. 1982), and *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976), which Kidder reads (Pet. 13 n.8) as rejecting the relevance of judicial economy in the pendent jurisdiction analysis, merely note that, standing alone, "the time already invested in litigating [a] state cause of action is an insufficient reason to sustain the exercise of pendent jurisdiction." *Weaver*, 683 F.2d at 746; *accord*, *Tully*, 540 F.2d at 196. The notion that litigation time "should not be given *dispositive* weight," *Shaffer*, 730 F.2d at 912 (emphasis added), does not, of course, mean that it is not deserving of any consideration. Indeed, once again, cases that Kidder fails to cite demonstrate that the Third Circuit often does consider and base its decision on interests in judicial economy. *See, e.g., Sparks v. Hershey*, 661 F.2d 30, 33-34 (3d Cir. 1981); *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 479 (3d Cir. 1979).

In short, the courts of appeals do not divide into two camps as Kidder suggests. To the contrary, the courts are following carefully this Court's direction in *Carnegie-Mellon* to "consider and weigh *in each case* . . . the values

of judicial economy, convenience, fairness, and comity," and deal with individual cases "in the manner that most sensibly accommodates a range of concerns and values." 484 U.S. at 350 (emphasis added). As even Kidder ultimately concedes (Pet. 17), "with respect to [such] multifactor balancing tests, differences in outcomes will generally be attributable to factual differences in the cases and will not present issues warranting this Court's review." Indeed, the above examination of the caselaw indicates that Kidder is not a superior judicial archaeologist, able to "find" conflicts that others cannot, but rather has simply created two sides of an artificial conflict by selectively identifying cases with different outcomes and quoting out-of-context snippets from those cases.[6]

II. THE COURT OF APPEALS' DECISION IS CORRECT

Just as the supposed circuit conflict is a result of Kidder's own creation, so too is the error that Kidder asserts was committed by the court below. Kidder claims (Pet. 10-16) that the court below gave too much weight to the interest in federal-state comity (Pet. 10, 12) and considered "the mere existence of a parallel state proceeding . . . sufficient to render any exercise of pendent jurisdiction an abuse of discretion" (Pet. 15). Examination of the court's decision, however, reveals that Kidder simply

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[6] Recognizing that the alleged circuit conflict does not withstand analysis, Kidder attempts to develop (Pet. 13) an alternate conflict over the propriety of exercising pendent jurisdiction where the federal and state claims have a common dispositive issue that has already been decided by the court in resolving the federal claim. This principle, however, has no applicability here because, contrary to Kidder's suggestion (Pet. 13), a resolution of the so-called "standing/injury issue" was *not* necessary to determine the federal claims. The district court's declaration that Maxus could not pursue federal claims relied on Maxus' representations that it would not do so—representations having nothing to do with the "standing/injury issue." *See infra* pp. 16-17.

has mischaracterized both the terms of that decision and the context in which that decision was rendered.

First, Kidder's suggestion (Pet. 10, 12) that the court of appeals gave unwarranted weight to comity and adopted an automatic rule based on "the mere existence of a parallel state proceeding" cannot be reconciled with the court's decision. The court of appeals reviewed the underlying facts with care and concluded that, while the concern for judicial economy deserved weight, the concern for comity plainly was more important in the context of this case. First, the court noted that the plaintiff, Maxus, had chosen to litigate its state law claims in state court, a "choice of forum [that] should have been honored" by the district court. Pet. App. 15a. In addition, as the court below also noted (Pet. App. 14a), the state court proceedings were significantly advanced (*e.g.*, the case had involved several pre-trial motions and forty depositions, and, at the time of the district court's decision, was set for trial within four months). Moreover, the important state law questions that Kidder sought to litigate had yet to be addressed by the state courts; and, as the court of appeals observed, the Texas courts were entitled to an opportunity to "'develop and apply state law.'" Pet. App. 15a (quoting *Mayer v. Oil Field Sys. Corp.*, 803 F.2d 749, 757 (2d Cir. 1986)). Finally, the federal claims had been resolved prior to trial, and in reversing the district court's decision to reach the state law claims, the court of appeals thus was merely paying heed to this Court's direction in *Carnegie-Mellon* and *Gibbs* that "in the usual case," 484 U.S. at 350 n.7, where "the federal claims are dismissed before trial . . . the state claims should be dismissed as well." 383 U.S. at 726.[7]

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[7] This rule, of course, is not "to be applied inflexibly in all cases," *Carnegie-Mellon*, 484 U.S. at 350 n.7—a point the Second Circuit and other courts of appeals readily recognize. *See, e.g., Enercomp, Inc. v. McCorhill Publishing, Inc.*, 873 F.2d at 545; *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1178 (7th Cir. 1987). But

This recognition of, and sensitivity for, the importance of allowing the state court to address state law claims was clearly appropriate in light of this Court's repeated admonitions, in a variety of contexts, that the lower federal courts should not give "unwarrantedly short shrift to the important values of federalism and comity." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986); *accord, Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987); *Gibbs*, 883 U.S. at 726-27. Thus, in the circumstances of this case, the court of appeals correctly concluded that the "strong interests in federalism and comity in this case pointed toward divestiture of pendent jurisdiction." Pet. App. 14a. Indeed, the court below reversed the district court's decision precisely because that court failed to give the comity concerns arising from the facts of this case *any* weight in the balance. Pet. App. 13a-15a, 17a. Kidder's contrary argument simply misreads the decision below.

Second, as the court of appeals noted, such a deferential approach is particularly appropriate where, as here, the state law issues retained by the district court were not "so inextricably intertwined with 'federal policy that the argument for exercise of pendent jurisdiction [was] particularly strong.'" Pet. App. 15a (quoting *Rosado v. Wyman*, 397 U.S. 397, 404 (1970) (internal quotations omitted)). Contrary to Kidder's suggestion (Pet. 13), the issues relating to standing, injury, and equitable relief are not inextricably bound up with, or common to, the federal securities claims that the district court adjudicated. As the court of appeals noted (Pet. App. 12a-13a), the district court's declaratory judgment on the federal law claims was properly entered only to confirm Maxus' representations that it would not pursue those claims. Accordingly, contrary to Kidder's assertions, the resolution of the federal claims (and the rep-

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nothing suggests that this was not the "usual case" and that dismissal therefore was not the proper course.

resentations that Maxus made that it would not pursue them) did not require adjudication of the state law questions of standing, injury, or equitable relief under *Bangor Punta*.[8]

Third, in a similar vein, Kidder's argument (Pet. 14-15) that the court of appeals adopted a "novel and unprecedented understanding of comity" is completely unfounded. Kidder points repeatedly (Pet. 6 n.2, 13, 15) to the corporate standing issue and claims that only Delaware law is at stake by virtue of Maxus' status as a Delaware corporation.[9] But, even assuming that Maxus' "capacity to sue" under Federal Rule of Civil Procedure 17(b) is controlled by Delaware law, the district court purported to decide other issues (sometimes loosely labeled as "standing" issues), *e.g.*, the nature of Maxus' injury and the scope of the damages that it equitably could receive. *See* Pet. App. 26a-27a, 29a. These issues arise in connection with Maxus' Texas claims for, among other things, negligence and breach of contract and therefore are controlled by Texas law. Thus, contrary to Kidder's suggestion, the comity interest was fully implicated, and the court of appeals rightly concluded that the proceedings would benefit from the "surer-footed reading of applicable law" that a Texas court could bring to bear. *See Gibbs*, 883 U.S. at 726.

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[8] The bases for these representations illustrate that the state and federal issues were not inextricably intertwined. Maxus declined to pursue the federal securities claims to avoid uncertainty concerning whether Maxus met the statutory prerequisites for each claim. Specifically, there were substantial questions as to whether Maxus had standing to assert a § 10(b) claim as a "purchaser" or "seller" of "securities." In addition, under *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977), Maxus clearly could not pursue a claim for damages under § 14(e), which provides an action for damages only for a shareholder of the target company in a tender offer.

[9] Kidder repeatedly asserts (Pet. 6 n.2, 15) that Maxus agreed Delaware law applied to all issues. That is not the case; throughout the proceedings, Maxus maintained that Texas law governed most aspects of the parties' dispute.

Fourth, Kidder similarly errs in suggesting (Pet. 10, 18) that the court below grossly undervalued the importance of the judicial economy concern implicated in this case by giving insufficient weight to the multidistrict nature of the proceedings before the district court. In fact, only one of the 32 separate corporate transactions at issue in the multidistrict proceedings pending in the district court had anything to do with this case. Moreover, of all the cases in the multidistrict proceedings, the Diamond Shamrock/Natomas acquisition is at issue only in *Munninghoff v. Boesky*, 87 Civ. 8884(MP) (S.D.N.Y. filed Dec. 16, 1987), which presents federal law claims by former Natomas shareholders who allegedly sold their stock to entities controlled by Boesky. However, while those claims have a few points in common with Kidder's state law declaratory relief claims (*e.g.*, whether Seigel "tipped" Boesky on the Natomas transaction), they do not in any way require resolution of the state law issues unique to this action (*e.g.*, whether Kidder breached its financial advisory agreement with Diamond Shamrock or violated its fiduciary duties to Diamond Shamrock); and, significantly, they have nothing to do with *any* of the injury or damages issues relating to Maxus that Kidder alleges should have been adjudicated by the district court in the interest of judicial economy. Thus, even *Munninghoff* has nothing to do with the state law issues unique to this action, and the court of appeals rightly refused to allow the pendency of the multidistrict proceedings to control the pendent jurisdiction analysis.[10]

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[10] Indeed, in pointing to this concern, Kidder demonstrates that it, not the court of appeals, is taking a per se approach in which judicial economy interests are "the central and controlling elements." Pet. 8. Thus, Kidder goes so far as to suggest (Pet. 14) that, under *Hagans v. Lavine*, 415 U.S. 528, 546 (1974), pendent jurisdiction *must* be exercised "given advantages of economy and convenience and no unfairness to litigants." This rigid reading misconceives *Hagans* and the nature of the pendent jurisdiction

Finally, Kidder's concern (Pet. 18) for "the district court's authority to manage multidistrict and other complex litigation" is unfounded and self-serving. As noted (*supra* pp. 17-18), this case has only a nominal overlap with the multidistrict proceedings pending before the district court. Moreover, the multidistrict issues to which Kidder points—the Judicial Conference's criticism of high litigation costs in mass tort litigation (Pet. 18 n.15) and Congress' authorization for multidistrict litigation (Pet. 18 n.16)—simply are not implicated here. Both the Judicial Conference and Congress spoke to the benefits of consolidating judicial proceedings in one forum.[11] The district court's judgment, however, expressly declined to resolve certain state law claims, and thus necessarily produces piecemeal litigation of the parties' dispute. It did not, for example, resolve the merits of the breach of contract claim pending in the Texas action. Nor did it resolve the negligence, fraud, or breach of fiduciary duty claims that are awaiting trial in the Texas court. Rather, at most, the district court merely decided certain damage issues relating to some of those claims. As the Delaware court recognized when asked to make similar piecemeal rulings, this type of "pretrial pruning of a claim to be litigated elsewhere" is not only "unprecedented," but "has the seeds of great inefficiency embedded in it." *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 1988 WL 140228, *1 (Del. Ch. Dec. 27, 1988).[12]

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analysis; as this Court noted in *Carnegie-Mellon*, "the doctrine of pendent jurisdiction . . . is a doctrine of flexibility." 484 U.S. at 350.

[11] In addition, Kidder's reference to Congress actually militates against review, by illustrating that Congress stands ready to step in and address Kidder's professed concerns. Indeed, Kidder neglects to mention that Congress recently has done so, expanding the pendent party jurisdiction of the federal courts in the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113.

[12] Kidder also suggests (Pet. 17 n.14) that the court of appeals improperly applied the abuse of discretion standard, but this ar-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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gument is unfounded and offers no basis for review. As noted above (*supra* pp. 15-16), the district court clearly abused its discretion by ignoring the substantial comity and federalism concerns present in this case. In addition, while Kidder claims that this Court "frequently . . . review[s] erroneous applications of the abuse of discretion standard," in fact, in none of the three cases Kidder cites was review granted for this purpose: *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980), presented a genuine conflict in the circuits on the proper construction of Fed. R. Civ. P. 54(b); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 689, 643 (1976), a per curiam decision, emphasized that federal courts should make broader use of sanctions as "a deterrent"; and *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 246 (1981), rejected the Third Circuit's automatic approach to forum non conveniens.